86-330

Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1986

DENNIS J. LE BEAU

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the precedential "lead" harassment cases decided and applied by the Merit Systems Protection Board and affirmed by the United States Court of Appeals for the Federal Circuit are in conflict with previous decisions on the same issues rendered by other Federal Circuit Courts of Appeals.

2. Whether the administrative and judicial standard for deciding the issue of harassment as a defense to a charge of illegal strike participation ought to be an objective "reasonable man" standard or a subjective intent standard.

3. Whether the standard adopted and applied by the MSPB and Federal Circuit Court of Appeals in deciding harassment defenses to illegal striking charges, even, if correct, was mechanically applied in the case of petitioner LeBeau so as to defeat any careful examination of his individual case by the U.S. Court of Appeals for the Federal Circuit.

4. Whether the Federal Circuit Court of Appeals erred in affirming the MSPB decision of wilfully withholding his services in concert with others during the 1981 air traffic controller strike.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Appeal No. 85-1215, decided April 25, 1986) will not be reported as per Court order, but is reproduced *infra*. The opinions of the Merit Systems Protection Board Chicago Regional Office and Full Board (Docket No. Ch075281F3181) are also reproduced in the Appendix.

JURISDICTION

The petitioner herein respectfully requests review of a decision by the United States Court of Appeals for the Federal Circuit dated April 25, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Dennis LeBeau, petitioner, was terminated by the Federal Aviation Administration (FAA) for allegedly participating in an illegal nationwide strike in August of 1981. His termination was appealed initially to the regional and Full Board Merit Systems Protection Board and finally to the Federal Circuit Court of Appeals, invoking 5 U.S.C. 7703 as a jurisdictional basis.

Mr. LeBeau, prior to his termination, had been employed as an air traffic controller for over ten years and in that time had gained the professional and personal respect of both supervisory personnel and fellow controllers.

Prior to his alleged offense, he had never participated in nor supported any of PATCO's job actions against the FAA and, indeed, maintained an exemplary attendance and work record.

In September, 1980, PATCO began formulating a new job action and sought a concensus from its members. Questionnaires were distributed asking whether the controllers would support a proposed strike action. Dennis LeBeau voted "no" on this and on future questionnaires, knowing that his opposition would be revealed at subsequent PATCO meetings.

In March of 1981, Mr. LeBeau again renounced the proposed strike in response to a question by the local PATCO

president to LeBeau and twelve other members of his crew. Of the group, only LeBeau stated he would not strike.

LeBeau took this opportunity to explain his reasons for opposing the strike. He stressed not only the potential irreparable harm a strike action could cause to the controllers in general, but also the personal consequences he feared, specifically the loss of income, foreclosure on his home and possible divorce by his wife who also opposed the strike.

LeBeau continued expressing his opposition to a strike and, as a job action changed from a potentiality to an inevitability, he began urging individual controllers at the workplace to refuse to join in the action. As one of the lone voices against the strike, Mr. LeBeau's position became known not only to supervisors but eventually to the Tower Chief.

As LeBeau had anticipated, his vocal opposition to PATCO's proposed action singled him out as a target for continuous harassment and threats by PATCO supporters, who viewed his actions as nothing less than traitorous. The extent and ferocity of PATCO's campaign of fear, though, could not have been anticipated.

At work, LeBeau became a pariah. If he was spoken to at all by his fellow controllers, it consisted of obscenities or the characterization of LeBeau as a "scab".

In a job where cooperation between coworkers is not only desired but essential, LeBeau became an outcast and learned that his fellow controllers would now only work harmoniously with him if ordered by a supervisor to do so—to the extent that he would not even be relieved for lunch by his coworkers.

As LeBeau continued to oppose the strike, continued to train supervisors in air control duties in the event of a strike, and continued to perform his own job to the best of his ability, the resentment of his fellow controllers grew in intensity.

While LeBeau battled PATCO at the workplace, PATCO began a new avenue of attack. To Dennis LeBeau's horror, the union discovered his home address and began an assault on his property and his family.

In February, 1981, his garage was splattered with eggs, and a few weeks later his car and that of his sister were covered in obscenities scrawled in shaving cream that was sprayed on the cars.

LeBeau contacted the LaGrange, Illinois, Police Department, reported the incidents and explained his opposition to the strike. A formal complaint was thereafter filed.

Fearful of further, possibly more violent, reprisals by PATCO, to his home and family, LeBeau realized the need for police protection as the impending strike drew near. He contacted James Tepper, Chief of Police of Broadview, Illinois and a personal acquaintance, and asked for assistance in persuading the LaGrange police to post a watch on his home.

Again, in June, LeBeau's house and car were vandalized and obscenities scrawled on them with toothpaste. Again, LeBeau requested police protection for his home and family.

At work, he was warned by controller Dennis Cunningham of one specific PATCO supporter, Bruce Van Dake who had threatened physical violence to anyone who tried to work during the strike. Cunningham advised LeBeau that LeBeau was in jeopardy.

The following Sunday, on his way to church, LeBeau was accosted by Van Dake, who had learned that LeBeau would not be attending a union strike meeting scheduled for that night. After LeBeau explained his opposition to the strike, Van Dake threatened that if LeBeau ". . . didn't show up (at the meeting), he would make sure that I didn't go down the stairs the next day, and he would personally put me in the hospital."

On August 2, 1981, local PATCO leaders informed their members that they were on strike beginning the next day. Dennis LeBeau's efforts at preventing the action had been in vain and, most importantly, he was now truly alone.

The threats, violence, hatred and harassment that he had endured for almost a year combined inexorably with a present fear for the safety of his family and himself, and Dennis LeBeau for a time submitted to the union's coercion. He knew that PATCO had organized a "security committee" whose sole purpose was to discover which controllers returned to work and to "go after" them. His previous opposition to the strike had called attention to Mr. LeBeau, and his surveillance was assured, as was the jeopardy to his family if he elected to work his shift.

Mr. LeBeau thus did not report for his August 3rd shift, or his August 5th shift. On August 6th, LeBeau went to the home of Eugene James, a supervisor, hoping that some arrangements could be made allowing his return to work and insuring the safety of his family and himself. He was told that he could use underground tunnels to go to work instead of the highly visible and accessible outside gates, and that the FAA would attempt to secure police protection for his family from the LaGrange Police Department.

Later that night, Mr. James telephoned LeBeau with the direct number to the Operations Officer, John Baldwin, who could coordinate LeBeau's return to work. When Mr. LeBeau finally got through to Baldwin, though, he was told he would not be permitted to return to work as he had missed his "deadline shift". The agency, on August 15th, notified LeBeau of its intent to remove him from his position.

Mr. LeBeau, as the first step of his appeal process, attended on oral reply before Richard Smolla, his designated hearing officer and described in detail the threats and harassment that ultimately led to his missing work. At Smolla's request, Mr. LeBeau, the next day, brought a copy of the complaint he had filed with the LaGrange Police Department and a supporting letter from Police Chief Tepper corroborating LeBeau's testimony.

On the basis of what had transpired at the oral reply, as well as the corroborating documentation, Mr. Smolla recommended that LeBeau be returned to duty. This was the only time such a recommendation was made by Smolla from the numerous oral replies he presided over.

This recommendation was, unfortunately, either discarded or ignored by the Tower Chief, who upheld Mr. LeBeau's termination for no discernible reason.

REASONS FOR GRANTING THE WRIT

A. The decision of the Federal Circuit affirming the Petitioner's termination relies on precedential decisions in direct conflict with those of other Circuits and is itself in conflict with precedential rulings of other Circuit Courts of Appeal.

Mr. LeBeau's termination was upheld by both the Regional and Board level MSPB and, in a cryptic three paragraph decision, the Federal Circuit Court of Appeals, affirmed. The Court found Mr. LeBeau's case so indistinguishable from prior "issue preclusive" precedents that the decision was also preordained.

It is these precedents, as well as their mechanical application by the Court, that have resulted in a decision that conflicts not only with previous precedents of other Circuits, but virtually obviates any meaningful decision making by the Federal Circuit itself.

Prior to the controller appeals, various Federal Circuits had attempted to define and explain the elusive charge of striking. Unanimously, they determined that a specific intent was required as part of the *prima facie* charge, and this intent, though differently delineated, was always couched in terms of voluntarily withholding of services in concert with others. *United Federation of Postal Clerks* v. *Blount,* 325 F.Supp. 879 (D.D.C. *aff'd,* 404 U.S. 802 (1971); *NLRB* v. *Southern Greyhound Lines,* 426 F.2d 1299 (5th Cir. 1970); also see *NLRB* v. *Union Carbide Corporation,* 440 F.2d 54 (". . . employees who refuse *as a matter of principle* to cross a picket line . . .").

From these decisions, it plainly followed that one who refuses to cross a picket line out of another reason, whatever it be, is not a striker and cannot be thus charged.

One reason an employee may not work is fear, and, it has been held, ". . . (one) who refuses to (cross a picket line) by reason of physical fear does not act on principle and may not be considered a striker." *Plain Dealer Publishing Company* v. *Cleveland Typographical Union No. 5,* 520 F.2d 1220, 1288 (6th Cir. 1975).

Thus, the law prior to the 1981 PATCO strike, while not crystal clear in all respects, at least firmly defined striking in terms of the individual intent of the accused—the intent to join a common cause, voluntarily, and out of principle. One who asserts the defense of harassment or coercion is not thus raising an affirmative defense but quite simply negating the charge itself. The judicial determination of striking must therefore rest primarily on the subjective state of mind of the individual accused, and the credibility and consistency of the testimony and evidence presented in support of the defense.

There is simply no other way to read the above mentioned precedents and, indeed, there is no other logical method of coming to grips with and deciding the charge of striking other than to look to the specific intent of the accused.

The MSPB felt differently. On November 10, 1982, the Full Board overturned the decision of a regional presiding official who had relied upon and followed the above cited precedents and reversed the firing of air traffic controller Louis Johnson on the fact that Johnson had credibly testified that his absence was due, not to strike intent, but to legitimate fear.

The MSPB Full Board decision first arbitrarily placed federal employees charged with striking into a separate class of litigants, then devised—out of whole cloth—an

objective, "reasonable man" test for coercion, and finally sat the burden on the appellant to prove, by preponderance of evidence, not that the *appellant* lacked the intent to strike but that a reasonable man would have lacked the intent to strike. *Johnson* v. *Department of Transportation, FAA,* MSPB Docket No. DC075281F0998 (Nov. 10, 1982).

By this new, bizarre theory, Louis Johnson's termination was affirmed *in the absence of any finding that he intended to strike.* By this precedent, all further appeals could be affirmed even though finding that the appellant did in fact withhold his services out of fear, not out of principle. By this case, such a finding would indeed be irrelevant. Mr. Johnson was found by the Full Board to have been striking. They had no need to disturb the seemingly contradictory finding of fact by the presiding official that ". . . he *involuntarily* stayed away from work because of a fear for his personal safety and that of his family."

The Federal Circuit Court of Appeals, after thoroughly analyzing the MSPB decision in *Johnson* in light of previous judicial precedent, concluded that the Board had indeed totally contradicted case law. The Court affirmed, though, on the basis that it ". . . cannot say that the Board abused its discretion . . . in adopting the standard it did." *Johnson* v. *Department of Transportation, FAA,* 735 F.2d 510 (Fed. Cir. 1984).

A careful reading of the MSPB's *Johnson* decision, *supra,* also illustrates a glaring contradiction with prior Federal Circuit precedent which was either unnoticed or deemed unimportant when the Court affirmed. Prior to *Johnson,* the Court decided what it characterized as the "lead" case of *Schapansky* v. *Department of Transportation, FAA,* 735 F.2d 411 (Fed. Cir. 1984). *Schapansky* affirmed another novel approach to the controller cases

the MSPB had adopted by which, in order to prove a *prima facie* case of strike participation against an employee, the agency had only to prove unauthorized absence, not the intent to strike.

The burden to rebut with a non-strike related reason for absence, the Court explained in its affirmance, then shifts to the employee. In the absence of rebuttal, a mere *prima facie* case could suffice. The Court took pains to emphasize, though, that despite the shifting burdens of persuasion and the order of producing evidence, the burden of proving the charge by a preponderance of the evidence *remains at all times on the agency.*

Johnson blatantly turned the burden of proof on its head and, at least with the defense of coercion, demanded the *employee* prove his innocence, by a preponderance of the evidence. The crazy-quilt of illogical, contradictory and baldly pro-employer reasoning of *Johnson* was thus adopted as another "lead" case and became a bloodbath of appellants who, though possible legitimately not on strike, could not begin to understand much less prove a case under these standards.

In the stroke of a pen, years of well reasoned judicial precedent were rendered a nullity—at least for a specific group of employees.

The Court ventured further in its quest to define what "objective" fear was *not* in the case of Lawrence Martel. *Martel* v. *Department of Transportation, FAA,* 735 F.2d 504 (Fed. Cir.) *cert. denied,* 105 S. Ct. 432 (1984). Mr. Martel claimed fear of possible union harassment through the constant monitoring of his work, in the event he crossed the picket line, and further testified as to a vague threat that he would "be sorry" if he did not strike. The

Court, through rejecting these allegations, did agree with *Martel* that the coercion test was not limited to only fear of *physical* danger.

Finally, in 1985, the Court decided the appeals of three more controllers claiming harassment, consolidated under *Ferrando, et al.* v. *Department of Transportation, FAA,* 771 F.2d 489 (Fed. Cir. 1985). Appellant Ferrando alleged threatening, anonymous phone calls and the threat of damage to his home. Appellant Erickson testified to a fear of being ostracized, appellant Zullo alleged vandalism which, although characterized by the Court as strong evidence, occurred *after* Zullo had missed his deadline shift, thus could not have *caused* him to miss his shift. Again, the Court had no trouble either placing each allegation into one of the MSPB's pigeonholes of allegations that absolutely would not suffice to prove harassment, and allowing the seemingly invincible reasonable man to show how inconsequential these fears really were.

The petitioner herein would not have gone into such detail regarding these three decisions but for the fact that, on the one hand they have veered so far from the reasoning of the pre-strike precedents of other circuits that a definitive statement is required by this Court, and on the other hand, it is these three citations that all but decided LeBeau's appeal.

It is readily apparent, from even a cursory reading of the above "indistinguishable" precedents that Mr. LeBeau's case is indeed very distinguishable. Johnson's primary allegation of harassment consisted of an "argument" with a fellow controller while agency testimony placed him on the picket line. LeBeau at no time walked the picket line. Martel's main worry was that his performance might be "monitored" by union members. The

allegations of the *Ferrando* appellants were equally minimal.

Dennis LeBeau, on the other hand, produced evidence of his consistent and vocal opposition to the strike from its inception. The threats and violence directed at him were not vague or general. They were specific and real. LeBeau was a target because he had dared oppose the union. His complaint to the police and his pleas for protection were not imaginary nor vague, but resulted from verifiable assaults on his home. His requests for help in returning to work were corroborated. He at no time stood on the picket line.

If there exists any valid comparison at all between Mr. LeBeau's facts and those of the precedential cases cited by the Court, it is in how overwhelmingly stronger and convincing LeBeau's case is. The testimony as to his harassment was credible, and his belief as to why he was harassed is reasonable.

What the Court has done, it seems, is not claim that Mr. LeBeau's *facts* are indistinguishable from the above cases but that his *category* is.

With the aid of the reasonable man, there is no need to assess the credibility of a witness, no need to grapple with a possible *pattern* of threats and coercion, no need to discern how or why one appellant may be more susceptible to harassment in certain circumstances than another. The reasonable man has no need to be—and really has no business being—concerned with the individual circumstances of appellants and the fact that every appellant is a unique human being. If the reasonable man can endure certain coercion in one set of circumstances, then by definition he can endure it in any circumstance.

Thus, as certain threats, certain acts of harassment are found objectively unpersuasive in different appeals, they are precluded from persuading in all appeals. Eventually, as Mr. LeBeau discovered, the entire issue of coercion is precluded from discussion. All aspects of this defense have been decided and all are futile.

The MSPB, regional and Board level, found that LeBeau was opposed, consistently and vocally, to the proposed strike, that he endured threats of violence and actual violence directed specifically at him due to his anti-strike stance, and that he asked his supervisors for help in combatting the threats and returning to work.

Because of Court and MSPB precedent, though, Mr. LeBeau could still be found to be a striker. His unimpeached, corroborated and credible evidence was rendered not only indistinguishable under *Johnson* and its spawn, but irrelevant. The Federal Circuit said as much in its decision which slammed the door once again on an obviously loyal employee who was destroyed because he stood up to the union.

Any type of precedential legal reasoning that leads to this result is wrong. The Federal Court put itself in conflict with all other Circuits in the country who had pondered the issues, and this conflict is reflected in its wrong-headed affirmance of outlandish MSPB decisions.

A subjective test for the subjective defense of harassment would not lend, as the Court may have feared, to necessary acceptance of all claims of coercion, legitimate or not. A judge or presiding official can make credibility determinations and reject the defense on that basis. This at least is far more logical than attempting to create reasonable men and place them in the circumstances of each

individual appellant. This exercise in fact rejects credibility determinations in favor of pure, unadulterated speculation.

Mr. LeBeau was tried and decided under standards and precedents which contradict prior law and each other. His judicial appeal was precluded from its inception due to the Court's unwillingness to decide individual cases and Court precedent that made it unnecessary to do so. Because he was an air traffic controller, he became part of a class, a class that was determined to be entitled to less judicial protection than other litigants. All he requests is what he is due.

CONCLUSION

For the foregoing reasons, petitioner Dennis J. LeBeau respectfully suggests the decision of the United States Court of Appeals for the Federal Circuit affirming his termination be reversed or, in the alternative, remanded with instructions.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DENNIS J. LEBEAU,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 85-1215
MSPB Docket No. CH075281F2181

DECIDED: APRIL 25, 1986

Before BALDWIN, NIES, and ARCHER, *Circuit Judges.*

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is *affirmed.*

OPINION

Counsel declined the invitation to request oral argument. We have determined on the basis of the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in *Johnson* v. *Department of Transportation, FAA,* 735 F.2d 510 (Fed. Cir. 1984); *see also Martel* v. *Department of Transportation, FAA,* 735 F.2d 504 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984); *Ferrando* v. *Department of Transportation, FAA,* 771 F.2d 489 (Fed. Cir. 1985).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); *see Hayes* v. *Department of the Navy,* 727 F.2d 1535, 1537 (Fed. Cir. 1984).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DENNIS J. LEBEAU,	Docket Nos. CH075281F2181
ANDRE J. LETOURNEAU,	CH075281F2203
RONNY H. METZKER,	CH075281F2386
JOHN E. MISNER,	CH075281F2412
WILLIAM L. RICHARDS,	CH075281F2731
JAMES J. VECCHITTO,	CH075281F3177

Appellants[1]

v.

DEPARTMENT OF TRANSPORTATION AGENCY,

OPINION AND ORDER

In a single initial decision issued on January 31, 1983, after a consolidated hearing, the removals of appellants from their positions as air traffic controllers at the O'Hare Air Traffic Control Center, Chicago, Illinois, were sustained on charges of striking in violation of 5 U.S.C. § 7311 and absence without leave (AWOL).

[1] The hearing on these appeals was consolidated under the lead name of *William C. Balderman,* MSPB Docket No. CH075281F0935.

Applying *Schapansky* v. *Department of Transportation,* MSPB Docket No. DA075281F1130 (Oct. 28, 1981), *appeal filed,* No. 82-132 (Fed. Cir. Jan. 14, 1983), the presiding official found that the agency had made a *prima facie* case of strike participation by proving as to each appellant his unauthorized absence during the strike period.

Each appellant then had the opportunity to rebut the *prima facie* case by showing that his absence was due to factors other than voluntary participation in the strike. Unpersuaded by the rebuttal evidence presented by each appellant, and finding the affirmative defense of equitable estoppel raised by appellants Metzker and Richards unproved, the presiding official determined that removal was for the efficiency of the service and was a reasonable penalty for striking. In reaching this conclusion, the presiding official relied on *Schapansky, supra,* at 9-12.

The appellants have filed separate petitions for review; the agency has responded to each petition. The petitions for review are GRANTED except for the challenges of the presiding official's conclusion on the *prima facie* case against each appellant. The petitions raising that issue do not persuade us either that the *Schapansky* decision was incorrectly applied or that any findings in the *Schapansky* decision were erroneous.[2]

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[2] *See Noa* v. *Department of Transportation,* MSPB Docket No. NY075281F0697 at 5 (Apr. 25, 1983), *appeal filed,* No. 83-1152 (Fed. Cir. June 27, 1983); *Anderson* v. *Department of Transportation,* MSPB Docket SL075281-F0347 at 3 (Apr. 25, 1983), *appeal filed,* No. 83-1152 (Fed. Cir. June 27, 1983); *Campbell* v. *Department of Transportation,* MSPB Docket No. DE075281F0674 at 4 (Apr. 25, 1983), *appeal filed,* No. 83-1173 (Fed. Cir. June 27, 1983). Any alleged errors in the Board's *Schapansky* decision will be resolved on judicial review.

We shall consider the petitions of the appellants in the following order: Andre Letourneau, James J. Vecchitto, John E. Misner, Dennis J. LeBeau, Ronny H. Metzker, and William L. Richards. The challenge of the finding on the efficiency of the service, raised in the petitions of appellants LeBeau, Metzker, and Richards and based on similar evidence and common arguments, shall be considered by subject matter.

* * *

DENNIS J. LEBEAU

Appellant LeBeau argues in his petition for review that ample evidence of coercion appears in the presiding official's findings of fact, I.D. at 10-13, and that her analysis of those facts to conclude they do not meet the standard for coercion set forth in *Johnson, supra,* is erroneous. We have reviewed the presiding official's application of the *Johnson* standard and find no error.

The presiding official noted that appellant's house and car were vandalized but that the damage was superficial, easily remedied, and without significant permanent damage. She correctly concluded that fear of damage to one's property is not a factor in determining whether a person's participation in a strike can be excused, citing *Jones* v. *Tennessee Valley Authority,* MSPB Docket No. AT075280103 (Feb. 19, 1982); *Duckett and Yardley* v. *Tennessee Valley Authority,* MSPB Docket No. AT075-28010325 (Feb. 19, 1982); *Plain Dealer Publishing Co.* v. *Cleveland Typographical Union,* 520 F.2d 1120 (6th Cir. 1975); and *Josnson, supra.*

She also found no direct threat of physical danger to appellant if he attempted to report for work during the strike. *See Johnson, supra,* at 11-12. Appellant contends that the presiding official's determination that all of the threats were general is contrary to the evidence. Appellant refers specifically to "threats" made in his presence while he was eating lunch next to some members of

PATCO. Appellant claimed he heard these remarks and that they were designed for him to hear. He does not claim that any threats were directed at him, and, as noted by the presiding official, had appellant attempted to discern the atmosphere at the facility during the strike, he would have found that no one was physically harmed or prevented from crossing the picket line. I.D. at 13. We find no error in the presiding official's application of the *Johnson* standard.

We find no prejudicial error in the alleged failure of the agency deciding official to consider the recommendation of the official designated to hear appellant's oral reply. That recommendation was to return appellant to work. Appellant argues that the deciding official did not testify that he considered the recommendation. He did testify, however, that he considered appellant's written and oral responses, and the recommendation was part of the summary of the oral response. Moreover, assuming the recommendation was not considered, appellant has not shown how the failure was harmful error.[10] *See Baracco, supra.*

The presiding official correctly held that appellant LeBeau had failed to rebut the *prima facie* case against him.

The agency erroneously served its response on appellant's prior representative.[11] Contrary to appellant's

* * *

[10] We note that the oral reply official's recommendation is not supported by anything in the summary of the oral reply or the attachments, neither of which contained substantive replies to the charges of striking and AWOL.

[11] A copy of counsel's letter of September 28, 1981, identifying himself as appellant's counsel bears no certification of service on the agency. Nevertheless, a copy of the letter was included in the agency file and the Board also had notified the agency of the change in representative prior to the time for filing the response.

charge that cited testimony of fellow controllers and supervisors does not relate to the seriousness of the misconduct, was not relevant at the time of the agency decision, and is not relevant now on the issue of efficiency of the service.

The presiding official correctly held that appellants' removals were for the efficiency of the service.

CONCLUSION

The initial decision dated January 31, 1983, sustaining the removals of appellants Dennis J. LeBeau, Andre J. Letourneau, Ronny H. Metzker, John E. Misner, William L. Richards, and James J. Vecchitto, is AFFIRMED AS MODIFIED herein.

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c). Each appellant is hereby notified of the right under 5 U.S.C. § 7701(b) to seek judicial review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. 20435. The petition for judicial review must be received by the Court no later than thirty (30) days after each appellant's receipt of this order.

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Secretary

SEP 30 1985
Washington, D. C.

Attachment: Statement of the Board's policy on the service of its opinions and orders.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

WILLIAM C. BALDERMANN	Decision No.: CH075281F0935
TIMOTHY P. KINSLEY	Decision No.: CH075281F2055
DENNIS J. LEBEAU	Decision No.: CH075281F2181
ANDRE J. LETOURNEAU	Decision No.: CH075281F2203
RONNY H. METZKER	Decision No.: CH075281F2386
JOHN E. MISNER	Decision No.: CH075281F2412
WILLIAM L. RICHARDS	Decision No.: CH075281F2731
JAMES J. VECCHITTO	Decision No.: CH075281F3177

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Date: January 31, 1983

INTRODUCTION

By separate petitions timely filed in the Chicago Regional Office (CHRO) of the Merit Systems Protection Board (Board), appellants William C. Baldermann, Timothy P. Kinsley, Dennis J. LeBeau, Andre J. Letourneau, Ronny H. Metzker, John E. Misner, William L. Richards and James J. Vecchitto appealed the actions taken by the Department of Transportation, Federal Aviation Administration (FAA), removing them from their positions as Air Traffic Control Specialists at the Chicago-O'Hare Air Traffic Control Tower (ATCT) in Chicago, Illinois. Appellants Letournea, Metzker, and Richards were removed effective August 24, 1981; appellants Misner and Vecchitto were removed effective August 25, 1981; appellants Baldermann and Kinsley were removed effective August 31, 1981; and appellant LeBeau was removed effective September 6, 1981. Each appellant seeks to have his removal action set aside.

JURISDICTION

Federal employees have the right to appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation. 5 U.S.C. 7701(a) (1980). Since each appellant is a non-probationary employee in the competitive service, each is entitled, by statute and regulation, to appeal his removal action to the Board. 5 U.S.C. 7511(a)(1)(A), 7512, 7513(d), and 5 C.F.R. 752.401(a) and (b)(1), 752.405(a). evidence sufficient to rebut the agency's *prima facie* case. Absent rebuttal, I find that the agency supported its first charge by the requisite burden of proof. Accordingly, this first charge is sustained.

DENNIS LEBEAU

The specification in support of the first charge against this appellant states that he participated in the illegal strike when he failed to report for his scheduled shifts from 1500 hours on August 3 through August 5, 1981. To support this charge the agency submitted documentary evidence as well as the testimony of the Tower Chief. This evidence establishes that the appellant had the following schedule: the 3:00 p.m. to 11:00 p.m. shift on August 3, 4, and 5, 1981; and that the appellant did not appear for work on those dates and that he was not granted any type of approved leave for this period. (H.T. at 112-115; 121-123.) In light of my finding that an illegal strike was in progress and this evidence that the appellant was scheduled to work but did not appear, and the fact that he was recorded as absent without authorization on the time and attendance records, I find that the agency established a *prima facie* case that appellant LeBeau participated in the illegal strike as charged. *See Schapansky.*

The appellant was given the opportunity to rebut this *prima facie* showing by demonstrating that he had no knowledge of the existence of the strike or by demonstrating that his absence was due to some factor other than intentional participation in the strike. *Schapansky,* at 6; *Losure* v. *Interstate Commerce Commission,* 2 MSPB 361, 366 (1980).

The appellant presented evidence to show that his absence from work was caused by a reasonable fear of injury. In *Johnson* v. *Department of Transportation,* MSPB Order No. DC075281F0998 (November 10, 1982), this Board recognized that an employee's alleged participation in a strike action might be negated by evidence of duress or coercion. The Board held that the appropriate standard for establishing such a defense required the employee to demonstrate that his failure to report for work was the result of a threat or other intimidating conduct, directed toward him, sufficient to instill in him a reasonable fear of physical danger to himself or others which a person of ordinary firmness would not be expected to resist. The Board also found that allegations of menacing tones or language, fear of financial ruin or jeopardy to career advancement, exuberant moral suasion, or any vexation, annoyance, or pressure resulting in a state of mental perturbation, or a reluctance to act or a choice of inherently unpleasant situations might not suffice to render involuntary an employee's alleged participation in a strike. In applying these standards to Johnson, the Board held that "menacing tones and generalized threats (including a statement heard by Johnson shortly before the strike that 'scabs' (would end) up with bullet holes in them" and a Citizen's Band radio transmission involving a "menacing" exchange concerning Johnson) and various "personal problems" which Johnson had experienced shortly before the strike (including a divorce and painful dental work) were insufficient to rebut the agency's *prima facie* case.

To support his defense of coercion, the appellant submitted documentary evidence, his own testimony, and the testimony of several witnesses to attest to incidents the appellant considered to be threatening. This evidence discloses that on three occasions in 1981, prior to the strike, appellant's home and automobile were vandalized after PATCO meetings at which appellant voiced his opposition to going out on strike. In February, appellant's garage door was splattered with eggs. In March, eggs were splattered on his home and car, and obscenities were writ-

ten on them in what appeared to be shaving cream foam. The appellant reported this latter incident to the LaGrange Police Department and asked that a special watch be made of his home, but this request was denied. On June 26, 1981, eggs were again splattered on appellant's car and home and obscenities were written on them in toothpaste. After the March and June incidents, the appellant testified he contacted the Chief of Police of Broadview, Illinois, to seek his assistance in obtaining a special watch on his home from the LaGrange Police Department. A letter from the Broadview Police Chief confirms that his assistance was requested; this letter, however, does not establish whether the Chief did, in fact, contact the LaGrange Police Department on appellant's behalf.

The appellant testified to certain acts of intimidation at the facility. On one occasion in March following a PATCO meeting, appellant discovered the handle had been broken off of his lunch box and his lunch box was stuffed with garbage. At about this time appellant learned that two other controllers who were also against the strike, found their cars' tires deflated and headlights broken while parked in the facility's parking lot. Following this incident, the appellant obtained permission to park his car in another lot away from the place where most air traffic controllers parked.

Due to the appellant's consistent anti-strike attitude and his cooperation with management, PATCO supporters refused to cooperate with him in the performance of his duties. The evidence adduced at the hearing establishes that militant PATCO members gave the appellant the cold shoulder treatment or verbally abused him by calling him a "scab" or other obscenities. During his work shift, the evidence establishes that PATCO supporters ensured that appellant had the least desirable duties and generally refused to relieve him unless ordered to do so by a supervisor. On at least one occasion after the appellant relieved a supervisor, the appellant and a PATCO member engaged in a heated argument in the Tower.

The appellant recalled several instances when he was threatened. While eating his lunch next to some PATCO members in the facility's lunchroom in April of 1981, the appellant claims he heard them discussing damaging cars and painting scabs' houses. The appellant also heard them state that "it would be a good idea" to bring in goons to break some legs to prevent people from crossing picket lines, and further, that it would be easy to order a truck load of rocks to dump on a scab's lawn.

After a meeting in June at which the appellant recommended PATCO's acceptance of the agency's contract offer, he was informed by a friendly co-worker that a PATCO militant stated that he would personally stop anybody from going to work. There is no evidence in the record that the PATCO militant made a direct reference to the appellant. The appellant told this PATCO militant that he did not want to go to the June 17, 1981 PATCO meeting and the militant told the appellant that if he did not go to that meeting, he "would make sure that (appellant) didn't go down the stairs the next day, and he would personally put (appellant) in the hospital." (H.T. at 619.) The appellant attended the meeting on June 17, 1981.

The appellant testified that he did not report for work on August 3, 1981 because he "was afraid . . . (he) didn't know what would happen. Since they had gotten to my house and to my car and as close as they did to my family, I didn't know how violent they would really get, especially after talking to (the militant PATCO member who threatened him) and hearing some of the comments that were made at the meeting the night before." (H.T. at 626.) Appellant did not elaborate on the exact nature of the comments at the meeting, nor on the statements made by the militant PATCO member.

I have carefully examined the appellant's testimony and the other evidence he submitted in light of this Board's holding in the *Johnson* case. In order to establish

a defense of coercion sufficient to excuse the appellant's participation in the strike, he must show, as stated above, that his decision not to report to work was based upon a reasonable fear of physical danger to himself or others. The evidence presented by appellant LeBeau falls short of meeting this burden. While I note that the appellant's car and house were vandalized, the type of damage appellant established was superficial in character, easily remedied, with little significant permanent damage. Moreover, the appellant has cited no authority, and I know of none, which includes fear of damage to one's property as a factor in determining whether a person's participation in a strike can be excused. *See Jones* v. *Tennessee Valley Authority,* MSPB Order No. AT07528010300 (February 19, 1982); *Ducket and Yardley* v. *Tennessee Valley Authority,* MSPB Order No. AT07528010325 (February 19, 1982); *Plain Dealer Publishing Co.* v. *Cleveland Typographical Union,* 520 F.2d 1220 (6th Cir. 1975); and *Johnson,* 18 C.J.S. Social Security 240.

In my examination of the evidence I find no direct threat of physical danger to the appellant if he attempted to report for work during the strike. I find the threats of putting people in the hospital or bringing in goons to break people's legs to prevent them from crossing the picket lines to be general in nature and directed at no one person in particular. Such threats are therefore, insufficient to rebut the agency's *prima facie* showing of strike participation. In making this finding I note that the appellant never attempted to report for work from August 3 through August 6, 1981, and never made an attempt to call anyone at the facility until August 7, 1981. He, therefore, had no knowledge of the situation at the facility regarding picketers. (H.T. at 651-659.) Since the appellant was not aware of the picketing activities at the Tower, I can only conclude that his failure to cross the picket line was not based on a reasonable fear of bodily harm or violence from the picketers. Moreover, had

the appellant attempted to discern the atmosphere at the Tower, he would have found that no one was physically harmed or prevented from crossing the picket line. I note that the Tower Chief testified that there was no violence on the picket line, and that approximately two-thirds of the non-striking controllers chose to cross the picket line rather than use the tunnel to reach the facility. (H.T. at 116-117, 709-710.)

While the appellant presented testimony from at least one controller that he refused to cross the picket line after receiving "a lot of verbal abuse" and being spit upon (H.T. at 690-691), I find that verbal abuse or spitting is insufficient to establish a reasonable fear of bodily harm. Accordingly, I find that the appellant participated in the illegal strike when he withheld his services from the agency on August 3, 4, and 5, 1981, and this charge is sustained.

* * *

PENALTIES

In my review of the record on appeal, I considered whether the appellants are entitled to have their removals mitigated to lesser penalties in accordance with the Board's holding in *Douglas* v. *Veterans Administration*, MSPB Order No. AT075299006 (April 10, 1981). In *Douglas*, the Board held that in selecting a penalty an agency must strike a responsible balance within the limits of reasonableness. I have considered the reasonableness of the penalty imposed in these cases, in light of 5 U.S.C. 7311, which prohibits a person who participated in a strike against the federal government from holding a position in the government. I find that the clear intent of that statute requires the removal of striking employees. In *American Postal Workers Union* v. *U.S. Postal Service*, 682 F.2d 1280, the Court refused to allow striking employees to return to duty because of 5 U.S.C. 7311. In *Schapansky* at 9-11, this Board held that partici-

pating in the PATCO strike constituted particularly egregious conduct which destroyed the controller's unique relationship of trust with his employer and that the penalty of removal was not clearly excessive or disproportionate to sustained charges of striking against the agency. Accordingly, I find that the penalty of removal was properly imposed by the agency here.

Appellant Metzker's Motion for Reconsideration of Denial of Appellant's Motion for Summary Judgment, dated April 9, 1982, was not ruled upon prior to the hearing. This motion was denied at the hearing and the appellant requested a formal ruling. Since the appellant has not demonstrated any harm from the failure of the agency to timely serve its answer upon the appellant's substituted representative and the statutes and regulations defining the authority of the Merit Systems Protection Board do not provide for the entry of summary judgment relief such as that requested by the appellant, appellant's motion is again denied.

CONCLUSION

In summary, I find that the agency supported its charges of strike participation and unauthorized absence against each of the appellants. I find that the appellants failed to meet their burden of showing an affirmative defense which would require the overruling of the agency's action. I find that the penalty of removal was reasonable and that the appellants' removals will promote the efficiency of the service.

DECISION

The removal actions against appellants are affirmed.

This decision is an initial decision and will become a final decision of the Merit System Protection Board on March 7, 1983.